Supreme Court, U.S.
FILED
OCT - 9 1996
OFFICE OF THE CLERK

No. 96-343

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

VILLAGE OF SCHAUMBURG,
a Municipal Corporation,

Petitioner,

v.

AMOCO OIL COMPANY,
a Maryland Corporation,

Respondent.

On Petition for Writ of Certiorari to the Illinois Appellate Court, First District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent requests that the Court deny the Petition for Writ of Certiorari, seeking review of an opinion by the Illinois Appellate Court, First District. The appellate court's opinion is reported at 277 Ill. App. 3d 926, 214 Ill. Dec. 526, 661 N.E.2d 380 (1995). The Illinois Supreme Court denied Petitioner's Petition for Leave to Appeal. *See* 167 Ill. 2d 549, 217 Ill. Dec. 662, 667 N.E.2d 1055 (1996).

STATEMENT OF THE CASE

Respondent respectfully opposes the Petition for Writ of Certiorari. None of the Rule 10 factors governing review on certiorari is present. The opinion of the appellate court is a straightforward application of this Court's decisions in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. ___ (1994). It is consistent with other federal and state courts considering similar issues. Finally, the decision sought to be reviewed is not final. The case is currently pending in the Circuit Court of Cook County, Illinois, for trial on damages.

A. Course of Proceedings and Disposition of the Case Below.

The opinion of the appellate court correctly sets forth both the facts of the case and its procedural history in a comprehensive and accurate manner. In accordance with Rule 15(2), Respondent respectfully invites this Court's attention to the appellate court's opinion.

B. Correction of Misstatements in the Petition.

The Petition contains two persistent factual and legal themes, both of which are false. First, Petitioner repeatedly contends that Respondent was not damaged after Petitioner repealed the ordinance containing the illegal dedication condition. In truth, when Petitioner repealed Respondent's permit, it stripped Respondent's ability to improve its property altogether as punishment for Respondent's refusal to capitulate to what *Nollan* recognized as an outright plan of extortion.

Second, Petitioner wrongly focuses only on that portion of Respondent's property which Petitioner was attempting to expropriate. For purposes of Respondent's takings claim, the property taken by Petitioner's action was not simply the two frontages, but its total denial of Respondent's ability to utilize its entire parcel for a lawful use, no different than had Petitioner erected a fence around the property. More to the point, the issue of takings damages has not been decided in this case and is a matter for disposition by the Illinois state courts.

REASONS FOR DENYING THE WRIT

I.

THE APPELLATE COURT'S DECISION WAS A CORRECT APPLICATION OF THIS COURT'S REGULATORY TAKINGS DECISIONS.

Petitioner makes the following arguments:

1. A municipality may require any transfer of private property without compensation as it deems fit as a condition of a special use permit, so long as there is no actual physical taking.

2. Where a municipality requires a dedication of a portion of an owner's property, and the owner still retains possession of the remainder of the property, the property owner has suffered no regulatory taking.

3. A municipality cannot be held accountable for an unconstitutional taking when those actions are "legislative."

4. The imposition by Petitioner of a condition to a special use permit requiring Respondent to donate over 20% of its property, without Petitioner having conducted any individualized analysis as to the impact of the improvements on the necessity for the required conveyance of property, still satisfies *Nollan*.

The appellate court correctly saw through these arguments and disposed of each of them. The appellate court's decision is consistent with the decisions of this Court and presents no new federal questions for consideration. The Petitioner's claim that this decision conflicts with other state and federal decisions is erroneous. This decision creates no conflict among the courts.

Section II of this brief addresses the Village's contention that the appellate court's takings decision conflicts with a prior decision of this Court, or presents an issue undecided by this Court. Section III of the brief addresses the contention that the opinion of the appellate court conflicts with other state and federal takings decisions.

II.

THE APPELLATE COURT'S DECISION IS CONSISTENT WITH *NOLLAN*, *DOLAN*, AND OTHER FIFTH AMENDMENT EXACTION CASES.

Petitioner argues the takings claim became moot because the unconstitutional condition was imposed by way of a special use permit that was invalidated when the condition was rejected, precluding any physical invasion of the property. (Petitioner's Brief at 11.) Petitioner relies on the Illinois Supreme Court's decision in *Goffinet v. County of Christian*, 65 Ill. 2d 40, 22 Ill. Dec. 79, 382 N.E.2d 399 (1976). *Goffinet* involved an amendment to a zoning ordinance, rezoning a property from agricultural to industrial, which conditioned the rezoning upon a particular use. *Goffinet* held that "conditional zoning is not invalid per se . . ." and that if an owner does not adhere to an otherwise valid condition, the result may be the revocation of the conditional zoning or special use permit. 65 Ill. 2d at 51, 53.

The Petitioner's argument in reliance upon *Goffinet* does not present a federal question. This Court's review of the argument is unnecessary. The *Goffinet* opinion is a state zoning decision and the Village's reliance upon it is misplaced. The appellate court correctly ruled on this Illinois zoning question. Moreover, to accept the Village's

logic would allow the Village to push the envelope of constitutionality, without recourse, by attaching illegal conditions to special use legislation with impunity.

The appellate court held that *Goffinet* was inapplicable. *Amoco Oil Co. v. Village of Schaumburg*, 277 Ill. App. 3d 926, 943-44, 214 Ill. Dec. 526, 537, 661 N.E.2d 380, 391 (1995). The appellate court recognized that the holding in *Goffinet* presupposed a validly enacted special use permit. *Id.* Petitioner's argument begs the question whether the special use permit was validly enacted. Consequently, the appellate court correctly found *Goffinet* not relevant.

Petitioner next argues that Respondent has no takings claim because there was no physical invasion of Respondent's property. (Petitioner's Brief at 9, 11.) Petitioner relies on the Illinois Supreme Court's decision in *Horn v. City of Chicago*, 403 Ill. 549, 87 N.E.2d 642 (1949). *Horn* does not apply to regulatory takings at issue in this case.

Horn involved physical taking, where the plaintiffs alleged a physical trespass onto their property. The case at bar involves a different type of taking, referred to as a title taking, "where the government acquires incidents of ownership or title to property or an exaction in lieu of the dedication of land." Robert H. Freilich and Elizabeth A. Garvin, *Takings After Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, 1993 Institute on Planning, Zoning and Eminent Domain §5.03. Title taking "differs from physical taking in that the regulating body does not physically invade the land but places a restriction on the use of the property that significantly interferes with ownership." *Id.* at §5.03[2][a].

As the appellate court duly noted, *Horn* is not controlling. *Amoco Oil Co.*, 661 N.E.2d at 389. The present case involves a regulation requiring Respondent to dedicate over 20% of its property as a condition to a special use permit. If Respondent were to capitulate, the Petitioner would have acquired fee title to Respondent's property. Such an exaction of property effectuates a title taking which courts have subjected to a takings analysis. *See Nollan*, 483 U.S. 825, *Dolan*, 512 U.S. ___, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994); *Sparks v. Douglas County, et al.*, 127 Wash. 2d 901, 904 P.2d 738 (1995); *Schultz v. City of Grants Pass*, 131 Or. App. 220, 884 P.2d 569 (1994); *Hernando County v. Budget Inns of Florida, Inc.*, 555 So. 2d 1319 (1990); and *Rohn v. City of Visalia*, 214 Cal. App. 3d 1463, 263 Cal. Rptr. 319 (1989).

Petitioner further contends that the opinions in *Patzner v. Baise*, 133 Ill. 2d 540, 142 Ill. Dec. 123, 552 N.E.2d 714 (1990), *LaSalle Nat'l Bank v. City of Chicago*, 128 Ill. App. 3d 656, 83 Ill. Dec. 819, 470 N.E.2d 1239 (1984), *St. Lucas Ass'n v. City of Chicago*, 212 Ill. App. 3d 817, 156 Ill. Dec. 885, 571 N.E.2d 865 (1991), and *Van Duyne v. City of Crest Hill*, 136 Ill. App. 3d 920, 91 Ill. Dec. 672, 483 N.E.2d 1307 (1985), control the outcome of this case. (Petitioner's Brief at 9.) The only common thread among these cases is that they all denied that a taking existed, but none of these cases is applicable to the present case. Certainly no issue for this Court's consideration is presented by this argument.

None of these cases involved a ***required*** dedication as a condition to the issuance of a land use permit. None of the property owners were required to give away ***their*** land, as Respondent was in this case. None of the Illinois cases had the benefit of this Court's guidance as set forth

in *Dolan*. Thus, the appellate court, in rendering its decision, was correct in refusing to apply the cases relied upon by the Village.

Nollan and *Dolan* illustrate that the government may effect a regulatory taking of private property, thus triggering the just compensation requirement, without an ***actual*** physical invasion. *Nollan* and *Dolan* recognize that governmental regulatory takings, involving the exaction of property as a condition to land use approval, do not fit neatly into the rubric of "inverse condemnation." As this Court stated in *Dolan*, "[w]ithout question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such dedication, a taking would have occurred." *Dolan*, 512 U.S. at ___, 114 S. Ct. at 2316. Similarly, as stated in *Nollan*, "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on agreeing to do so, we have no doubt there would have been a taking." *Nollan*, 483 U.S. at 831, 107 S. Ct. at 3145.

The appellate court is in accord with the decisions of this Court by refusing to require a physical invasion of property for a regulatory taking to exist.

Alternatively, Petitioner argues that no taking occurred because the dedication condition did not dispossess Respondent of its entire parcel, just a mere 20%, leaving Respondent with an economically viable use of its property. (Petitioner's Brief at 13-14.)

Petitioner's reliance on the "economically viable use" analysis is misplaced when examining *Nollan/Dolan* takings. The economically viable use test is applied where a regulation restricts the use of property but does not go so far as to require an exaction. *See Yee v. Escondido*, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992); *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978); *Andrus v. Allard*, 444 U.S. 51, 100 S. Ct. 318, 62 L. Ed. 2d 210 (1979). The economically viable use test, while appropriate for analysis of economic takings, does not apply to cases of outright or conditional land exactions. *See Keystone*, 480 U.S. at 496 ("The test to be applied . . . is fairly straightforward. A statute regulating the ***uses*** that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .' " (emphasis added) (citations omitted)).

A closer review of the cases cited by the Village shows they are distinguishable in other ways. In *Yee v. Escondido*, this Court expressly recognized that a regulatory takings claim was not properly brought before the Court and refused to consider the issue. *Id.* at 532-3 ("[P]etitioners attempt to challenge the ordinance on two other grounds: They argue that it constitutes a . . . regulatory taking. [This] claim is not properly before us."). Petitioner also relies on *United States v. Alaska*, which is not even a takings case. This Court dealt with the specter of a taking in a footnote which discussed the applicability of *Nollan* to the case. *United States v. Alaska*, 503 U.S. 569, 590 n.12, 112 S. Ct. 1606, 1618, 118 L. Ed. 2d 222, ___ (1992) ("This rule [*Nollan*], however, has no applicability

in a situation such as this one, in which we evaluate the statutory authority underlying an agency's action.").

Keystone Bituminous Coal Assoc. v. DeBenedictis is also inapplicable because it strictly involved a facial challenge to legislation. *Keystone*, 480 U.S. at 493 ("Thus, *the only question before us is whether the mere enactment of the statutes and regulations constitutes a taking.*" (emphasis in original)). The posture of *Keystone* substantially differs from this case, where Petitioner refused to issue building permits and subsequently repealed Respondent's special use permit because Respondent refused to capitulate to an unconstitutional condition.

Penn Central is the prototypical economic regulatory takings case and its analysis does not apply to exaction takings. *Penn Central* stresses that a parcel must not be viewed as distinct segments, but as a whole. *Penn Central*, 430 U.S. at 130-31. This viewpoint is essential in economic regulatory takings cases because those types of takings deal with restrictions on a private property owner's ***use*** of the property. Every land use regulation, by definition, restricts some rights of a property owner's use. Were the property not viewed as a whole, every land use regulation would constitute a taking.

Exaction cases such as *Nollan, Dolan*, and this case, mirror the infringements found in physical takings cases where a property owner is required to relinquish real property title, not just submit to restriction of property rights. The relevant inquiry in these cases is whether the governmental body takes the property within the bounds of its authority, not whether the taking amounts to a significant enough infringement to even constitute a taking. *See Penn Central*, 438 U.S. at 124. ("A 'taking' may more

readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") The vast differences in the types of takings in *Penn Central* and this case renders *Penn Central* inapposite.

Petitioner's reliance on *Andrus v. Allard* is misplaced. *Andrus* was specifically predicated on the fact that the property owner was not required to surrender the property. *Andrus*, 444 U.S. at 66 ("In this case, it is crucial that the appellees retain the rights to possess and transport their property, and to donate or devise the protected birds."). In this case Respondent was required to surrender its property. *Andrus* also held that the destruction of one "strand" in the bundle of rights does not amount to a taking "because the aggregate must be viewed in its entirety." *Id.* Viewing the Subject Property in the aggregate, Respondent was dispossessed of many "strands" in the bundle of property rights. Among other things, Respondent lost its ability to exclude others from its property; lost its right to receive just compensation for its property which Petitioner attempted to take for public use[1]; and, lost its right to devote its entire parcel for a lawful use until it paid its "land tax." While Respondent may retain some value in its property, that value is held in abeyance by the Petitioner until and unless Respondent succumbs to the unconstitutional condition. This Court has expressly stated:

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[1] The State has recognized Amoco's right to receive just compensation for the taking of its property for public use by filing a condemnation action.

> [T]he government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for public use—in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit.

Dolan, 114 S. Ct. at 2317.

Finally, *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993), does not support the Petitioner's position. *Concrete Pipe* is an economic regulatory takings case, which did not involve surrender of any property. This Court set forth the appropriate framework for analysis of takings such as the one in this case in *Nollan* and *Dolan*. The appellate court followed those decisions.

The appellate court correctly applied the decisions of this Court by following the analysis set forth in *Nollan* and *Dolan* for determining the constitutionality of a condition attached to zoning legislation, and by distinguishing the line of cases that deal with economic regulatory takings. Petitioner's misapplication of the "economically viable use" test in requesting review by this Court should be rejected. Accordingly, the Petition for Writ of Certiorari should be denied.

Petitioner also argues that *Nollan* and *Dolan* do not apply because both cases involve "adjudicative" rather than "legislative" actions. (Petitioner's Brief at 9.) The appellate court rejected this argument, stating, "Schaumburg thus apparently believes that it may skirt its obligation to pay compensation when taking private property for public use merely by having the Village Board of

trustees [sic] pass an 'ordinance' rather than by having a planning commission issue a permit. . . . Certainly a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating it citizen's property." *Amoco Oil Co.*, 277 Ill. App. 3d at 940, 942, 214 Ill. Dec. at 535, 536, 661 N.E.2d at 389, 390.

In *Parking Lot Association of Georgia v. City of Atlanta*, ___ U.S. ___, 115 S. Ct. 2268, 132 L. Ed. 2d 273 (1995), Justice Thomas, joined by Justice O'Connor, addressed the legislative distinction argument in a dissenting opinion. Justice Thomas wrote, "A city council can take property just as well as a planning commission can. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference." *Id.* at 115 S. Ct. 2268-69. The Illinois Supreme Court has also held that a "legislative" exaction requirement may effect a taking. *Northern Illinois Homebuilders v. County of DuPage*, 165 Ill. 2d 25, 208 Ill. Dec. 328, 649 N.E.2d 384 (1995). Also, cases in other jurisdictions further support the application of *Nollan* and *Dolan* to permit conditions cloaked in "legislative" garb. *Trimen Development Co. v. King County*, 124 Wash. 2d 261, 877 P.2d 187 (1994); *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 618 N.Y.S.2d 857, 643 N.E.2d 479 (1994); and *Schultz v. City of Grants Pass*, 131 Or. App. 220, 884 P.2d 569 (1994); *Goss v. City of Little Rock*, ___ F.3d ___, 1996 WL 408530 (8th Cir. 1996).

Contrary to the Village's argument, case law demonstrates that a "legislative act" is not insulated from judicial review. This narrow issue does not require this Court to exercise its discretionary review.

Petitioner next argues that should *Nollan* and *Dolan* apply, the dedication condition satisfied their test requirements, (Petitioner's Brief at 12), that there be a nexus between the proposed use of the property and the condition which the government seeks to impose, and that the condition be roughly proportional to the proposed use. *Dolan*, 512 U.S. at ___, 114 S. Ct. at 2317-19.

The appellate court rejected this argument as "belied by the record in this case." *Amoco Oil Co.*, 277 Ill. App. 3d at 938, 214 Ill. Dec. at 534, 661 N.E.2d at 388. The appellate court further stated that "the record is replete with evidence showing that the required dedication had little or no relationship to the anticipated impact of the proposed development." *Id.* at 939, 214 Ill. Dec. at 534, 661 N.E.2d at 388. Specifically, the court found that "Schaumburg's exaction of over twenty percent (20%) of Amoco's property on the basis of a de minimis increase in street traffic—four-tenths of one percent (0.4%)—does not correspond with the slightest notions of rough proportionality." *Id.* at 943, 214 Ill. Dec. at 537, 661 N.E.2d at 391. In sum, the court held that the Village's attempted exaction of Amoco's property constitutes a taking. *Id.* at 944.

The appellate court, after full review of the record, correctly applied *Nollan* and *Dolan* to the facts of this case. There is no reason for this Court to review the case, which is factually similar to, and even more egregious than *Dolan*.

III.

THE APPELLATE COURT'S DECISION IS CONSISTENT WITH THE TAKINGS DECISIONS OF OTHER STATE AND FEDERAL COURTS OF APPEAL.

Petitioner also seeks this Court's review by asserting that the decision of the appellate court in this case conflicts with decisions rendered by other state and federal courts of appeals. (Petitioner's Brief at 17-19.) The cases cited by Petitioner as conflicting with this case are inapposite.

Quirk v. Town of New Boston, 140 N.H. 124, 663 A.2d 1328 (1995), merely involved maintenance of a buffer zone (i.e., a set back) on private property, but there was no required dedication of any property. Moreover, the decision on the takings argument was specifically limited to review under the state constitution. *Quirk*, 663 A.2d at 1331.

Estate and Heirs of Isabel Sanchez v. County of Bernalillo, 120 N.M. 395, 902 P.2d 550 (1995), involved the denial of a special use permit, but again there was no exaction of property at issue. Also, the court in *Sanchez* did not consider any federal takings cases in reaching its conclusion that a taking did not exist.

Again, in *M & J Coal Company v. United States*, 47 F.3d 1148 (Fed. Cir. 1995), the property owner was not required to dedicate any property. The property owner also did not have any property rights in the land it claimed was taken. As a result, the court was not even confronted with whether the regulation of the property amounted to a taking. *M & J Coal*, 47 F.3d at 1154.

However, cases from other jurisdictions support the conclusion reached by the appellate court that municipal-

ities may no longer impose regulatory conditions without the requisite fit between the condition and the proposed development. *See Trimen Development Co. v. King County*, 124 Wash. 2d 261, 877 P.2d 187 (1994); *Manocherian v. Lenox Hill Hospital*, 84 N.Y.2d 385, 618 N.Y. S.2d 857, 643 N.E.2d 479 (1994); and *Gordon v. Zoning Board of Appeals*, 126 Misc. 2d 75, 481 N.Y.S.2d 275 (1984).

In *Gordon*, a property owner applied for a variance to extend her side yard to construct additional bedrooms. The municipal zoning board granted the variation conditioned upon the owner filing a covenant "irrevocably offering for gratuitous dedication to the County of Rockland, a strip of her front yard sufficient to allow the County at some later date to widen the road so that it conforms to the official map." *Id.* at 481 N.Y.S.2d 277. The Court succinctly identified the nature of the municipal action:

> What the Board has done here, however, is require the petitioner to pay for her variance by prospectively ceding her land to the County. This the Board cannot do. No one disputes that the petitioner has made the requisite showing entitling her to an area variance [citation]. The Board cannot, however, impose an unconstitutional condition upon the granting of such a variance. The Board's action constitutes a taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution and Article I, Section 7 of the New York State Constitution.

Id. Gordon mirrors what happened to Amoco and, likewise, such action by the Petitioner constitutes an unconstitutional taking of private property.

The appellate court's decision in this case is consistent with the takings decisions in other state and federal appellate jurisdictions. As a result, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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